



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 538

IN THE MATTER OF WOLFGANG BAUER

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Wolfgang Bauer ("Bauer") enter into this Disposition Agreement ("Agreement") pursuant to §5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On March 30, 1994, the Commission initiated, pursuant to G.L. c. 268B, §4(j), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Bauer. The Commission has concluded its inquiry and, on April 11, 1995, found reasonable cause to believe that Bauer violated G.L. c. 268A, §3.

The Commission and Bauer now agree to the following findings of fact and conclusions of law:

1. Bauer is the Franklin town administrator. As town administrator, Bauer is the chief executive officer of the town and is responsible for the effective administration of all town affairs placed in his charge by or under the town charter.^{1/}
2. As town administrator, Bauer occasionally participates in matters concerning private construction projects in town. For example, Bauer occasionally attends meetings of and makes recommendations to the zoning board of appeals, the planning board and the conservation commission. He is involved in matters concerning zoning bylaw enforcement, bond posting, the setting of commercial developers fees and establishing development conditions (such as betterments, sidewalks, traffic studies, etc.). Bauer also appoints, subject to the consent of the City Council, and has the ability to terminate the building inspector and other major town officials.
3. During the relevant period, Patrick Marguerite ("Marguerite") and Francis Molla ("Molla") were builders/developers each independently involved in various private construction projects in the Town of Franklin. Marguerite and Molla had completed projects, had pending projects and expected to have additional projects in Franklin. In connection with these projects, they each have had matters before the building department, the planning board and the conservation commission. In furtherance of these projects, both Marguerite and Molla have had dealings with various town officials including Bauer as town administrator.
4. At all times here relevant, Marguerite, Molla and/or their families owned an apartment building in Franklin called the Union Square Apartments.
5. In February 1992, Bauer was looking for an inexpensive apartment to rent until his divorce was resolved, as he was living out of a hotel room. The Union Square Apartments had many vacancies.
6. Bauer, Marguerite and Molla entered into an oral agreement that allowed Bauer to rent one of the vacant Union Square two bedroom apartments at a reduced rent ("the apartment"). Bauer, Marguerite and Molla testified that they agreed that Bauer could rent the apartment at the reduced rate until Molla and Marguerite could rent the apartment at the prevailing market rate, at which time Bauer would either have to leave or pay the full rent.
7. Union Square two bedroom apartments rented for \$500 and up per month. There were no set rental values

for all two bedroom apartments, as the apartments were assigned rental values based upon their distance from the end of the building; farthest away from the railroad tracks had a higher rent, and those next to the railroad tracks had a lower rent. Molla, or his agent, selected the apartment that Bauer would occupy based on the existing vacancies. Bauer and Molla testified that Bauer paid \$200 rent each month for the apartment he occupied. There were always vacancies during Bauer's occupancy.

8. Bauer rented the apartment under this arrangement from February 1992 until September 1994 (31 months),^{2/} when Marguerite and Molla transferred ownership of the apartment building to a bank in lieu of foreclosure.

9. Section 3(b) of G.L. c. 268A prohibits a municipal employee from accepting anything of substantial value for or because of any official act or act within his official responsibility performed or to be performed by him.

10. Anything with a value of \$50 or more is of substantial value for §3 purposes.^{3/}

11. The above-described reduced rent rate was of substantial value each month.

12. By accepting a reduced rental rate each month while he then was, recently had been and/or soon would be in a position to take official action concerning Marguerite's and Molla's projects in town,^{4/} Bauer accepted an item of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so he violated G.L. c. 268A, §3(b) each month.^{5/}

13. The Commission is aware of no evidence that the rental arrangement referenced above was provided to Bauer with the intent to influence any specific act by him as town administrator. The Commission is also aware of no evidence that Bauer took any official action concerning any of Marguerite's or Molla's projects in return for the gratuities. However, even though the gratuities were only intended to foster official goodwill, they were still impermissible.^{6/ 7/ 8/}

14. Bauer fully cooperated with the Commission's investigation.

In view of the foregoing violation of G.L. c. 268A by Bauer, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed by Bauer:

(1) that Bauer pay to the Commission the sum of ten thousand dollars (\$10,000) as a civil penalty for his course of conduct in violation G.L. c. 268A, §3^{9/}; and

(2) that Bauer waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this agreement or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: January 24, 1996

^{1/} The town administrator administers and implements the directives and policies adopted by the town council. The administrator attends all council meetings and has the right to speak but not vote, makes recommendations to the council, prepares the town budget, serves as ombudsman and performs any duties required by the charter, bylaw or order of the council. The administrator, with the approval of the council, may establish, reorganize or consolidate any department, board, commission or office under his jurisdiction. Additionally, subject to ratification by the council, the administrator's appointments include police and fire chiefs, zoning board of appeals members and redevelopment authority members.

^{2/} Bauer's divorce proceedings continued until September 8, 1993.

^{3/} See *Commonwealth v. Famigletti*, 4 Mass App. 584 (1976).

^{4/} For §3 purposes it is unnecessary to prove that any gratuities given were generated by some specific identifiable act performed or to be performed. In other words, no specific *quid pro quo* corrupt intent need be shown. Rather, the gift may simply be an attempt to foster goodwill. It is sufficient that a public official, who was in a position to use his authority in a manner that would affect the giver, received a gratuity to which he was not legally entitled, regardless of whether that public official ever actually exercised his authority in a manner that benefitted the gift giver. See *Commission Advisory No. 8*. See also *United States v. Standefer*, 452 F. Supp. 1178 (W.D.P.A. 1978), *aff'd* other

grounds, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 479-482 (5th Cir. 1978).

^{5/} As the Commission stated in *In re Michael*, 1981 SEC 59, 68,

A public employee need not be impelled to wrongdoing as a result of receiving a gift or a gratuity of substantial value in order for a violation of Section 3 to occur. Rather, the gift may simply be an attempt to foster goodwill. All that is required to bring Section 3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obligated to do — a good job.

^{6/} As discussed above in footnote 4, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribe section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Bauer and Marguerite and/or Molla.

^{7/} In separate disposition agreements, Marguerite and Molla acknowledge violating §3(a) by entering into the above reduced rental arrangement with Bauer.

^{8/} There may have been a "mixed motive" in Marguerite and Molla giving and Bauer accepting the reduced rate apartment. In other words, Marguerite and Molla may have given Bauer the reduced rate for these reasons: (1) to foster official goodwill with Bauer as town administrator; (2) to generate income from an otherwise vacant apartment, and (3) to assist Bauer while he was going through his divorce.

This "mixed motive" contention is not a defense. Where a public employee was, recently had been, and/or soon would be in a position to take official action concerning matters affecting a party's interests, the party's gift of something of substantial value to the public employee and the employee's receipt thereof violates §3, even if there were additional reasons for the offer and receipt of the gift, unless the evidence establishes that these other reasons constitute the complete motive for the gift. See *Advisory No. 8*. See also *In re Flaherty*, 1990 SEC 498.

^{9/} The fine takes into consideration the economic benefit Bauer received by virtue of the reduced rent arrangement.